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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 528.

JOSEPH A. BRODERICK, SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK,

Appellant,

vs.

MARY ROSNER, ESSIE R. STONE, CAMILLA LOWRY, ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for Samuel H. Squire, superintendent of banks of the state of Ohio, respectfully moves this honorable court for leave to file the accompanying brief as *amicus curiae*.

JOHN W. BRICKER,
Attorney General of Ohio,
Counsel for Samuel H. Squire, Superintendent of Banks of Ohio, as *Amicus Curiae*.

Of Counsel:

W. DALE DUNIFON,
First Assistant Attorney General.

J. ROTH CRABBE,
Assistant Attorney General.

BRIEF OF JOHN W. BRICKER, ATTORNEY GENERAL OF OHIO, AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

There are now pending in the United States District Court, District of New Jersey, three suits instituted by the state of Ohio upon the relation of its superintendent of banks, seeking recovery of constitutional and statutory liability imposed upon residents and citizens of New Jersey, as owners of capital stock of certain Ohio banks now in the possession of the superintendent of banks of Ohio for liquidation. These cases are *State of Ohio ex rel. v. Anna H. McMaster*, Law No. 3648; *State of Ohio ex rel. v. Mame C. Holbrook, Law* No. 3649; *State of Ohio ex rel. v. Montclair Trust Co., etc.*, Law No. .....

The first two of these cases are pending upon motions to strike out the complaints, such motions being in the nature of demurrers. In support of these motions the respective defendants urge the application of Section 94b of the New Jersey Corporation Act (Ch. 50, p. 124, P. L. 1897), the validity of which is challenged by the appellant in this case. The third of the pending actions has recently been filed but it may reasonably be expected that a similar defense will be urged therein. The assessed liability sought to be recovered in the three cases exceeds $45,000.

The Security-Home Trust Co., Toledo, Ohio, and The Guardian Trust Co., Cleveland, Ohio, stockholders of which are defendants in the above litigation, as well as The Union Trust Co., Cleveland, Ohio, and The Standard Trust Bank, Cleveland, Ohio, are all in the possession of the superintendent of banks of Ohio for liquidation under Section 710-89, General Code.* The superintendent has levied an assessment against all of the stockholders of each of these banks, pursuant to Article XIII, Section 3, Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio. A number of stockholders of each of these banks reside in the state of New Jersey.

Unless Section 94b of the New Jersey Corporation Act is declared invalid by this court, it is manifest that the superintendent of banks of Ohio is precluded from recovering upon such assessments by an action at law in the courts of New Jersey, although such assessments have been validly levied under the law of Ohio.

By the points made in our argument, we shall seek to establish the proposition that Section 94b of the New Jersey Corporation Act and the final judgment of the court below, based thereon, will result in denial of the full faith and credit required under Article IV, Section 1, of the Constitution of the United States, to Article XIII, Section 3, of the Constitution of Ohio, and Sections 710-75 and 710-95, General Code of Ohio, and to the public act of the superintendent of banks of Ohio, pursuant thereto, in levying an assessment against the stockholders of banks organized under the laws of Ohio now in his possession under Section 710-89, General Code of Ohio.

*All pertinent Ohio Constitutional and statutory provisions appear in the Appendix.

II.

ARGUMENT.

SUMMARY OF ARGUMENT.

Point A.

Under Article XIII, Section 3, of the Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio, as interpreted by the Ohio courts, all stockholders of Ohio banks are subject to a constitutional and statutory double liability.

Point B.

Under Sections 710-75 and 710-95, General Code of Ohio, as construed by the courts of Ohio, the determination of the necessity for and the amount of stockholders' assessments by the superintendent of banks is an official or public act and cannot be controverted in an action brought to recover stockholders' liability.

Point C.

Under Article IV, Section 1, of the United States Constitution, New Jersey is required: (1) to permit enforcement against stockholders of Ohio banks residing in New Jersey of the liability provided under Article XIII, Section 3, Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio; and (2) to recognize the official

determination by the Ohio superintendent of banks of the necessity for such assessment, made pursuant to Sections 710-75 and 710-95, General Code of Ohio.

Point D.

The requirement of Section 94b, New Jersey Corporation Act, that the assessment may only be enforced through an accounting in an action initiated by a bill in equity, denies to the determination by the Ohio superintendent of banks that conclusive effect which attaches to such determination under the laws of Ohio.

POINT A.

Under Article XIII, Section 3, of the Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio, as Interpreted by the Ohio Courts, All Stockholders of Ohio Banks Are Subject to a Constitutional and Statutory Double Liability.

Since all sections of the Ohio Constitution and General Code applicable to the issues of this case are quoted in the Appendix hereto, reference will be made only to the pertinent portions thereof in the body of the brief.

The history of double liability of stockholders in Ohio dates back to the Constitution of 1851. In that Constitution there appeared what was known as Section 3 of Article XIII, the pertinent provisions of which are as follows:

> "Dues from corporations shall be secured by such individual liability of the stockholders, and other

means, as may be prescribed by law; but, in all cases, such stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

This constitutional provision affected stockholders of all corporations, including banks, and was in effect from 1851 to 1903 in the same form as originally enacted. In 1903 the provision for double liability on stock was repealed and from 1903 until January 1, 1913, there was no double liability on stockholders of any corporation, including banks.

Lang v. Osborn Bank, 100 O. S., 51, 125 N. E., 105.

In the year 1912 a Constitutional Convention was held in Ohio and as a result an amendment was adopted to the Constitution which became effective on January 1, 1913, being that part of Section 3, of Article XIII of the Constitution quoted below in italics. This section as amended has remained in its original form to the present time and reads as follows:

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; *except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.* * * *" (Italics ours.)

Under the Ohio Constitution of 1851 and the laws passed thereunder, the Ohio courts held that stockholders were only secondarily liable. Under these decisions the creditors' right to pursue the stockholders accrued only when the remedies against the corporation were exhausted either by process or by the insolvency of the corporation. *Morgan v. Lewis,* 46 O. S., 1, 17 N. E., 558; *Barrick v. Gifford,* 47 O. S., 180, 24 N. E., 259; *Younglove v. Lime Co.,* 49 O. S., 663, 33 N. E., 234; *Bronson v. Schneider,* 49 O. S., 438, 33 N. E., 233.

The 1912 amendment of Article XIII, Section 3, Ohio Constitution, above quoted, was held to be self-executing by the Supreme Court of Ohio in the case of *Lang v. Osborn Bank, supra.* The constitutional provision has remained unchanged and the courts of Ohio have consistently held stockholders liable thereunder. *Lang v. Osborn Bank,* 100 O. S., 51, where it was held that such liability applies to all indebtedness of the corporation while such amendment is in effect; *Andrews v. State ex rel.,* 124 O. S., 348; *Snider v. The United Banking & Trust Co.,* 124 O. S., 375; *State ex rel. v. Weinberger,* 44 O. App., 264, 185 N. E., 432; *State ex rel. v. Cole,* 14 Ohio Law Abstract, 464 (not officially reported); *Feldman v. Standard Trust Bank,* 46 O. App., 67, 187 N. E., 743, motion to certify overruled by the Supreme Court, 127 O. S., 181; *Fulton v. Wetzel,* 47 O. App., 72, 190 N. E., 776, petition in error dismissed, 128 O. S., 109, petition in error (*Wetzel v. Fulton,* No. 62, October Term, 1934) dismissed, 55 S. Ct., 207, petition for rehearing denied, 55 S. Ct., 236; *Baumgardner v. State ex rel.,* 48 O. App.,

5, 192 N. E., 349, motion to certify overruled by the Supreme Court of Ohio September 26, 1934, *sub nom Bender v. State ex rel.*, No. 24861.

Furthermore, under the decisions of the Ohio courts, such liability is not penal but is contractual in nature. In the cases of *Kulp v. Fleming*, 65 O. S., 321, and *Blair v. Newbegin*, 65 O. S., 425, the Supreme Court of Ohio had before it the question whether creditors of a Kansas corporation could use the Ohio courts to recover from stockholders residing in Ohio, liability imposed by Article XII, Section 2, of the Constitution of Kansas of 1859 and the General Statutes of Kansas of 1868, Chapter 23, Section 32, et seq. Recovery was permitted in each case. The court in *Kulp v. Fleming*, held, as disclosed by the first and fourth branches of the syllabus:*

> "1. A provision of statute that the stockholders of a corporation shall be individually liable to creditors for the debts of the company does not alone create the liability. It is rather a legislative requirement that whoever becomes a stockholder shall thereby assume an individual liability, and thus gives legal effect to the acts of the parties. The actual liability becomes operative by the act of a shareholder in becoming such, being founded on his proposal to become liable which arises from the membership and individual agreement to abide by the organic law of the corporation, and the acceptance thereof by the creditor by extending credit. Such obligation is contractual.

*Under Rule VI, Rules of Practice, Supreme Court of Ohio, the syllabus of the points of law decided is prepared by the judge writing the opinion and submitted to the judges concurring therein. The Court has held that the syllabus is an accurate and authoritative statement of the law laid down. *State ex rel v. Edmonston*, 89 O. S., 93; *Merrick v. Ditzler*, 91 O. S., 256; *Honhorst v. Honhorst*, 95 O. S. 408. The syllabus must, of course, be read in the light of the facts. *Williamson Heater Co. v. Radich*, 128 O. S., 124.

4. The individual liability of stockholders for debts of a corporation, provision for which is made by the constitution and statutes of Kansas, is not penal but is contractual. That liability may be enforced in Ohio. And a petition of a creditor in a suit against a stockholder which shows the constitutional and statutory provisions respecting such liability, and sets forth the construction given by the court of last resort of Kansas holding the liability to exist and to be several and contractual, and alleges other facts showing the ownership of the claim by plaintiff, the ownership of the stock by defendant, the insolvency of the corporation, its dissolution under the provisions of the statute and that it had suspended business more than a year before the commencement of the action, states a cause of action."

Furthermore, the cases under the National Banking Act are in point as to the nature of the liability created under Article XIII, Section 3, Constitution of Ohio, since, as pointed out by the court in *Baumgardner v. State, ex rel., supra,* at p. 16, that provision "is patterned after the National Banking Act, Section 5151 of the Revised Statutes of the United States, also known as Section 63 of Title XII, U. S. Code, the title on Banks and Banking." The court held that under the rule first stated in *Gale v. Priddy,* 66 O. S., 400, 64 N. E., 437, when statutes having a settled construction are adopted in this state, it is presumed that such construction is also adopted. The important decisions to the effect that the liability of a shareholder of a national bank is contractual are cited in the brief of appellant herein, at pages 16 and 17.

POINT B.

Under Sections 710-75 and 710-95, General Code of Ohio, as Construed by the Courts of Ohio, the Determination of the Necessity For and the Amount of Stockholders' Assessments by the Superintendent of Banks is an Official or Public Act and Cannot be Controverted in an Action Brought to Recover Stockholders' Liability.

After the 1912 amendment of Article XIII, Section 3, Constitution of Ohio, became effective, the General Assembly of Ohio enacted Sections 710-75, 710-89, 710-95 and 710-100, General Code of Ohio (108 Ohio Laws, Part 1, p. 80, *et seq.*). Section 710-89 authorizes the superintendent of banks to take possession of the business and property of a bank upon certain specified grounds, including insolvency. Section 710-100 authorizes any bank so taken over to enjoin further proceedings in liquidation if it deems itself aggrieved by such action of the superintendent of banks.

Section 710-75, General Code of Ohio, provides *inter alia:*

> "* * * At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders."

Section 710-75, General Code of Ohio, which enumerates certain powers of the superintendent of banks, when in possession of a bank under Section 710-89, provides that he "*may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders.*"

The courts of Ohio have held that when the superintendent of banks is in possession of a bank for liquidation, he alone can proceed against the stockholders to recover their constitutional liability, unless he wrongfully fails or refuses to do his duty, in conformity with the statute. *Feldman v. Standard Trust Bank,* 46 O. App., 67, motion to certify overruled by the Supreme Court of Ohio, 127 O. S., 181; *Fulton v. Wetzel,* 47 O. App., 72, petition in error dismissed, 128 O. S., 109. A petition in error was filed in this court (*Wetzel v. Fulton,* No. 62, October Term, 1934), and dismissed, 55 S. Ct., 207, and petition for rehearing denied December 10, 1934, 55 S. Ct., 236; *State ex rel. v. Addams,* No. 399, 558, Court of Common Pleas, Cuyahoga county, decided July 9, 1934 (unreported).

The most recent comprehensive decision of the courts of Ohio on the law of stockholders' liability is the case of *Baumgardner v. State, ex rel.,* 48 O. App., 5, 192 N. E., 349, motion to certify overruled by the Supreme Court of Ohio, September 26, 1934, *sub nom Bender v. State, ex rel.,* No. 24861. This and the companion case of *State ex rel. v. Snyder,* 17 Ohio Law Abstract, 193, petition in error dismissed, 128 O. S., 546, were actions by the superintendent of banks to recover the unpaid liability assessed

by him against the stockholders of the Ohio Savings Bank and Trust Co., Toledo, Ohio, who reside in Ohio. In the *Baumgardner* case the court held in the first, second, third, fourth and ninth branches of the syllabus:*

"1. Stockholders' liability under Section 3, Article XIII of the Constitution, providing for the double or superadded liability of stockholders, is primary.

2. Under the provisions of Section 710-75, General Code, and cognate sections, the taking possession of the property and business of a bank by the superintendent of banks for the purpose of liquidation fixes the right of the superintendent to proceed with the liquidation, and as incidental to such liquidation, to ascertain whether the assets of the bank will be sufficient to pay its debts and liabilities, and to enforce the double liability of stockholders.

3. Neither the bank nor its stockholders can contest the authority or discretion of the superintendent of banks to proceed with the liquidation and to ascertain the necessity of enforcing double liability and determining the amount thereof other than by the exclusive remedy provided in Section 710-100, General Code.

4. When the superintendent has determined upon and made an assessment of 100 per centum of the liability, the proceeding must be at law.

* * * * * * * * * * * * * * *

9. A petition, alleging demand of payment from stockholders, together with the filing of suit for same, necessarily implies without further averment

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*Under Section 1483, General Code of Ohio, the syllabus is prepared by the judge of the Court of Appeals delivering the opinion. Rule 12, Rules of Practice of Courts of Appeals of Ohio, conforms to this statutory requirement. Under such provisions the syllabus states the law of the case (*Lebanon v. Schwartz*, 4 O. App., 173; *Flanery v. Cleveland, etc., R. Co.*, 26 Ohio C. C. (n. s.) 49, 28 C. D., 7) although it does not necessarily state all of the points decided *Lebanon v. Harvey*, 45 O. App., 215, 187 N. E., 28.

that the superintendent had decided upon data satisfactory to him that it was necessary to enforce the full amount of the liability, and consequently such a petition is not defective for failure to state a cause of action.

* * * * * * * * * * * * *"

In the course of the opinion the court said (48 O. App., pp. 22-24):

"The provisions of the state banking act with reference to the enforcement of the super-added liability of stockholders, are contained in Sections 710-75 and 710-95 of the General Code. The pertinent parts of said sections are as follows:

'Sec. 710-75. *Individual liability of stockholders.* Stockholders of banks shall be held individually responsible equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * * *At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.*'

'Sec. 710-95. *Powers and duties after taking possession.* Upon taking possession of the property and business of such bank, the superintendent of banks is authorized to collect money due to such bank, and to do such other acts as are necessary to preserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. * * * *and may, if necessary to pay the debts of such bank, enforce the individual liability of the stockholders.*'

It will be noted that the last clause of Section 710-95, G. C., is in practically the same language as the last clause of that part of Section 192, Title 12, of the United States Code, above quoted, and that the last sentence of Section 710-75 fixes the time for the enforcement of such liability.

The above quoted portion of Section 192 of the National Banking Act is in practically the same form as it was at the time of the decision in the case of Kennedy v. Gibson, 75 U. S., above mentioned, and in applying the said provisions of said section, it was held in that case that:

> 'It is for the comptroller of currency to decide when it is necessary to institute proceedings against the stockholders, to enforce their personal liability, and how much shall be collected.'
>
> 'His determination is conclusive, and the stockholders cannot question it in the litigation that may ensue.'

This holding was followed and applied in the federal cases and in the cases from other states hereinbefore referred to, as well as in many other federal and state cases.

In the opinion of the court in the case of Kennedy v. Gibson, supra, the following language is used:

> 'The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected.'
>
> 'These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may

ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of the suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.'

Applying the rule of construction set forth in the case of Gale v. Priddy, 66 Ohio St., 400, supra; it is clear that by the amendment of the Constitution of 1912, above referred to, and the Banking Act providing for the procedural steps in enforcing the liability provided in the Constitution, power is conferred upon and delegated to the superintendent of banks at any time after taking possession of the bank for the purpose of liquidation, to ascertain upon such data as shall be satisfactory to him that the assets of such bank will be insufficient to pay its debts and liabilities, and upon such ascertainment being made, to enforce the individual liability of stockholders; and it is for him to decide upon such data as shall be satisfactory to him, when it is necessary to institute proceedings against the stockholders to enforce their personal liability and how much shall be collected, and his ascertainment and decisions are conclusive, and the stockholders cannot question them in the litigation that may ensue."

The case of *Kennedy v. Gibson*, 75 U. S., 476, 8 Wall., 498, is discussed in the brief for appellant herein at pages 21 and 22.

Further in the course of the opinion in the *Baumgardner* case, after quoting Section 710-100, General Code of Ohio, the court said at pages 26 and 27:

"While by this section the authority to bring such action is conferred on the bank, under the laws of

Ohio a stockholder would, in the event such bank refused to bring such proceeding upon demand by him, have the right to bring an action on behalf of the corporation under such section. So that any stockholder, under said section, where the superintendent of banks has taken possession of the property and business of the bank for the purpose of liquidation, has a complete and adequate remedy to enjoin further proceedings in liquidation, which necessarily includes the proceedings of the superintendent in ascertaining the necessity of and enforcing double liability and determining the amount thereof, in case the facts did not warrant and the superintendent of banks has been guilty of an abuse of discretion or fraud in taking possession of the property and business of the bank for the purpose of liquidation.

The remedy under this section is exclusive and when the superintendent of banks has taken possession of a bank for the purpose of liquidation, neither the bank nor its stockholders can otherwise contest the authority or discretion of the superintendent of banks to proceed with the liquidation and as incidental thereto, to ascretain the necessity of enforcing double liability and determining the amount thereof."

In determining the precise issue before it, the court upheld the rulings of the trial court in rejecting evidence offered on behalf of the stockholders, tending to show that the assets of the bank at the time the assessment was made were sufficient to pay its liabilities.

Under the law of Ohio, as well as under the New York Banking Law, and the National Banking Act, the delegation to an administrative officer of the power to determine the necessity for an assessment is not a delegation

of judicial power. In the case of *Baumgardner v. State, ex rel., supra,* the court said (48 O. App., at pp. 24-25):

> "It is held in the case of Bushnell v. Leland, 164 U. S., 684, decided January 4, 1897, that:
>
> 'Revised Statutes, Sections 5151 and 5234, empowering the comptroller to appoint receivers for insolvent national banks, and to make ratable assessments upon the stockholders, does not vest in him a judicial power in violation of the Constitution.'
>
> The provisions of the Constitution of this state, and the Constitution of the United States, with reference to the vesting and exercise of judicial power, are similar, and the holding of the Supreme Court that the power conferred on the comptroller to make ratable assessments on the stockholders, does not vest in him a judicial power in violation of the Federal Constitution, is by analogy applicable to the power vested in the superintendent of banks under the provisions of the Ohio Constitution and Banking Act.
>
> Furthermore, as the business of banking under the Constitution and laws of Ohio is of a quasi public character (124 Ohio St., 375, at 380), the determination and orders of the superintendent of banks as an official of the state under the supervisory and regulatory power over corporations reserved in the state and to its officers under Section 2 of Article XIII of the Constitution, are of an executive rather than a judicial character and do not come within the inhibition of the Constitution."

Section 2, Article XIII, Constitution of Ohio, appears in the Appendix hereto. The case of *Bushnell v. Leland,* 164 U. S., 684, is discussed in the brief for appellant, at pp. 35, 36.

In summary it appears under the law of Ohio with relation to the liability of stockholders of Ohio banks (1) that the liability created by Article XIII, Section 3, Constitution of Ohio, is not penal but contractual in nature; (2) that the superintendent of banks of Ohio, when in possession of a bank for liquidation, has the exclusive right to determine the necessity for and amount of stockholders' liability, and upon failure of the stockholders to respond to such assessment, after proper notice and demand, to bring action for its enforcement; (3) that the superintendent's determination of the necessity for and amount of an assessment is binding upon the stockholders in an action brought by him for the recovery of the assessed liability; and (4) that the delegation to the Ohio superintendent of banks of the power to levy assessments is valid. In each of these respects the law of Ohio is substantially the same as the law of New York.

POINT C.

Under Article IV, Section 1, of the United States Constitution, New Jersey is Required: (1) to Permit Enforcement Against Stockholders of Ohio Banks Residing in New Jersey of the Liability Provided Under Article XIII, Section 3, Ohio Constitution, and Sections 710-75 and 710-95, General Code of Ohio; and (2) to Recognize the Official Determination by the Ohio Superintendent of Banks of the Necessity for Such Assessment, Made Pursuant to Sections 710-75 and 710-95, General Code of Ohio.

Under the authorities so convincingly arrayed in the brief for appellant (pp. 38 to 70), it is clear that the measure of full faith and credit which, under Article IV, Section 1, each state is required to give "to the public acts, records and judicial proceedings of every other state", must be determined by the statutes and decisions of the courts of such other state. By reference to the Ohio law, it is apparent that New Jersey must permit enforcement of the contractual liability imposed upon the stockholders of Ohio banking corporations who reside in New Jersey. In a like manner it is equally clear that New Jersey must recognize the official determination by the superintendent of banks of Ohio as to the necessity for and amount of the assessment.

Upon principles of comity, Ohio lends its courts to aid sister states in enforcing liability which they impose

upon the stockholders of their own corporations. *Kulp v. Fleming*, 65 O. S., 321; *Blair v. Newbegin*, 65 O. S., 425. Nor has the superintendent of banks of Ohio, in charge of the liquidation of numerous Ohio banks, found the courts of any state, except New Jersey, closed to him in recovering liability assessed against stockholders of such banks residing in other states. The principles of comity involved are discussed in the brief for appellant at page 39, *et seq.*

Under Section 94b, New Jersey Corporation Act, and the decision of the courts below in the instant case, it is clear that New Jersey public policy precludes application of any such broad principles of comity. Thereby New Jersey would nullify the laws of New York, Ohio and numerous other states. To show that the constitutional and statutory provisions of New York and Ohio are by no means unique, we refer to the following decisions construing similar provisions of law existing in other states: *State Bank of Portland v. Gotshall*, 121 Ore., 92; *Thompson v. State, ex rel.*, 119 Okla., 166, 248 P., 1110; *Aber v. Maxwell*, 140 Ark., 203, 215 S. W., 389; *Houston Nat. Ex. Bank v. Chapman*, 263 S. W., 929 (Tex. Civ. App.); *Commissioner of Banks v. McKnight*, 281 Mass., 467, 183 N. E., 720; *Tunnicliffe v. Noyes*, 101 Fla., 794, 135 S., 505. All of the provisions construed in these cases follow closely the National Banking Act.

Since New Jersey refuses to apply the doctrine of comity to protect the depositors of New York, Ohio, and other state banks, these states must resort to the full faith and credit clause of the United States Constitution. We contend that this protection is ample and respectfully refer the court to the authorities discussed in the brief for appellant at pp. 39 to 70.

POINT D.

The Requirement of Section 94b, New Jersey Corporation Act, that the Assessment May Only be Enforced Through an Accounting in an Action Initiated by a Bill in Equity, Denies to the Determination by the Ohio Superintendent of Banks that Conclusive Effect Which Attaches to Such Determination Under the Laws of Ohio.

Under Section 94b, stockholders' liability created by the law of a sister state can be enforced in the courts of New Jersey only by an action "in a nature of an equitable accounting * * * to which such corporation and its legal representatives, if any, and all of its creditors and all of its stockholders shall be necessary parties."

Keeping in mind the nature of the liability imposed upon stockholders of banks by the law of Ohio and the power of the superintendent of banks of Ohio in enforcing that liability, it is inescapable that Section 94b results in denial of full faith and credit to the laws of Ohio and to the public act of its superintendent of banks in levying an assessment against the stockholders of an Ohio bank. Section 94b would substitute the judgment of the New Jersey Chancery Court for that of the superintendent of banks in the matter of ascertaining the necessity for and the amount of the assessment.

As a practical matter the remedy offered by New Jersey is not available to the superintendent of banks of

Ohio. Under Section 94b, all creditors and stockholders of the corporation are necessary parties to the equitable action for an accounting. The superintendent of banks of Ohio, in charge of the liquidation of The Standard Trust Bank, Cleveland, Ohio, has levied a 100% assessment against all of its stock. The owners of this stock reside in 47 states of the Union and several foreign countries. A score of them reside in New Jersey. The creditors, likewise, are scattered throughout the United States. Manifestly, it is impossible for the superintendent to successfully prosecute an action in New Jersey requiring all stockholders and creditors to be made parties, in order to recover the liability slightly in excess of $3,000.00 owed by residents of that state. Although the stockholders and creditors are less widely scattered, a similar situation exists in the case of The Guardian Trust Co., Cleveland, Ohio, The Union Trust Co., Cleveland, Ohio, and The Security-Home Trust Co., Toledo, Ohio.

We urge that Section 94b is violative not only of the full faith and credit clause but of the due process clause of the Fourteenth Amendment. *Whitman v. National Bank of Oxford*, 176 U. S., 559; *Hancock v. Farnum*, 176 U. S., 640.

III.

CONCLUSION.

Urging, as we do, that Section 94b, New Jersey Corporation Act, is unconstitutional, we submit that the judgment below should be reversed and the action remanded to the New Jersey courts for further proceedings in accordance with the provision of the Constitution of the United States.

Respectfully submitted,

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APPENDIX.

Article XIII, Section 2, Ohio Constitution.

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of stocks and securities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company or individual.

Article XIII, Section 3, Ohio Constitution.

Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such

shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank", "banker" or "banking", or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may hereafter be provided by the laws of this state.

Section 710-75, General Code of Ohio.

Stockholders of banks shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such bank, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. The stockholders in any bank who shall have transferred their shares or registered the transfer thereof within sixty days next before the failure of such bank to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way recourse which such stockholders might otherwise have against those in whose names such shares are registered at the time of such failure. In determining the said period of sixty days, the period or periods when any bank is in the possession of the superintendent of banks or is

operating under any restriction upon the withdrawal of deposits or the payment of liabilities shall be excluded. At any time after taking possession of a bank for the purpose of liquidation when the superintendent of banks ascertains that the assets of such bank will be insufficient to pay its debts and liabilities he may enforce the individual liability of the stockholders.

Section 710-89, General Code of Ohio.

The superintendent of banks may forthwith take possession of the business and property of any bank to which this act is applicable, whenever it shall appear that such bank:

1. Has violated its charter or any law applicable thereto;
2. Is conducting its business in an unauthorized or unsafe manner;
3. Is in an unsound or unsafe condition to transact its business;
4. Has an impairment of its capital for a period of ninety days;
5. Has refused to pay its depositors in accordance with the terms on which such deposits were received;
6. Has become insolvent;
7. Has neglected or refused to comply with the terms of a duly issued order of the superintendent of banks;
8. Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the banking department; or

9. Its officers have refused to be examined upon oath regarding its affairs.

If, by resolution of the board of directors of any bank, such bank requests such action and gives notice of the adoption thereof to the superintendent of banks in person, by telephone, telegraph or mail, the superintendent shall, as soon thereafter as may be practicable, take possession of the business and property of such bank.

Section 710-95, General Code of Ohio.

The superintendent of banks, upon taking possession of the business and property of any bank, shall have, exercise and discharge the following powers, authority and duties, without notice or approval of court, but subject to the provisions of this chapter, to wit:

1. To collect all money due to such bank.

2. To perform all such acts as are desirable or expedient in his discretion to preserve and conserve the assets and property thereof.

3. To exercise all the rights and powers of such bank under or by virtue of any mortgage, collateral, note, contract, judgment, decree or other instrument.

4. To sell for cash any asset or assets of such bank at not less than the face or par value thereof, or the actual amount owing thereon, and to settle, compromise or compound any debt owing to or held by such bank, or any claim enforceable by the superintendent of banks, when such bank has a common interest with ten or more persons or corporations in any claims, securities or property,

by becoming a party to an agreement between and among the parties interested; and to confer control of such property upon a committee.

5. To pay off and discharge any taxes, assessments, liens, claims or charges against the assets or property of such bank.

6. To pay out and expend such sums as he shall deem necessary for the preservation, maintenance, conservation and protection of any such property or any assets or property on which such bank has a lien by mortgage, pledge or otherwise.

7. To institute and maintain against the directors, officers or employes of such bank, or any of them, any suit or action which such bank, its shareholders or creditors might institute and maintain.

8. To take title in his name or in the name of a nominee to any asset, including shares and certificates for shares of stock of any corporation, and to exercise all voting power and otherwise of an unqualified owner; but the transfer or sale of any such asset shall be subject to the applicable provisions of this section.

9. If he ascertains that the assets of such bank will be insufficient to pay its debts and liabilities, to enforce the individual liability of each shareholder thereof as provided in Section 710-75 of the General Code. Until an order to declare and pay a final dividend shall be entered in the liquidation proceedings the right to enforce such liability is hereby vested exclusively in the superintendent of banks.

10. For the purpose of executing and performing any

of the powers and duties hereby conferred upon him, in his name as superintendent of banks in charge of the liquidation of such bank, to institute, prosecute and defend any and all actions or proceedings within or without this state, and to execute, acknowledge and deliver any and all deeds, leases, assignments, releases, contracts and other instruments necessary or proper. Any deed or other instrument executed pursuant to the authority hereby given shall be as valid and effectual for all purposes as if the same had been executed by the officers of such bank by the authority of its board of directors. If any real estate so conveyed is situated outside of the county in which the proceedings for the liquidation of such bank are pending, a certified copy of the order of the court approving or ratifying the sale or conveyance thereof shall be filed in the office of the recorder of the county within which such property is situated.

Without prejudice to or limitation of the foregoing powers, authority and duties, the superintendent of banks may, upon application to the Court of Common Pleas in which the proceedings for the liquidation of such bank are pending, or a judge thereof, and on such terms as such court, or such judge, may by order approve;

1. Sell or compromise any or all bad or doubtful assets and debts owing to such bank; compromise claims against such bank and sell, lease, exchange or otherwise dispose of any real estate or personal property, or both; of such bank, in whole or in part.

2. Sell or exchange assets of such bank, the consideration for which sale or exchange may be, in whole or in

part, claims against such bank; provided, however, no such sale or exchange of any such assets, shall be made at less than the appraised value thereof, as fixed by appraisers appointed as provided in Section 710-95b of the General Code.

3. Surrender or abandon any asset, which he considers of no advantage to creditors, including choses in action, whether the subject of pending litigation or not, and reject or disclaim any lease or contract which he considers burdensome.

4. Transfer and sell for less than the par or face value, shares of stock of any corporation the title to which is in his name or the name of such bank.

5. Enter into a contract or contracts appointing any state or national bank, a liquidating agent or agents or otherwise providing for the liquidation thereby of any asset or assets of such bank, upon the terms, conditions and considerations expressed in said contract or contracts.

In case of doubt or difficulty, the superintendent may ask the instructions of such court, or a judge thereof, as to the manner in which he should exercise his powers and discretion. He shall not be directed or restrained in the exercise of his powers or discretion otherwise than in a suit in equity in which it shall be alleged and proved that he has exceeded or abused such powers and discretion.

The superintendent of banks shall give notice of the hearing of each application made pursuant to this section

by publication in a newspaper of general circulation in the county in which the proceedings for the liquidation of such bank are pending. Each such notice shall be published once and shall set forth the time when such application shall be heard, which shall be not less than ten days after the publication thereof, provided, however, that such court, or a judge thereof, may by order dispense with such publication of notice and hear any such application at any time before the expiration of said ten day period. At the hearing on any such application, any shareholder, depositor or creditor of such bank shall have the right to appear and be heard.

No order of the Common Pleas Court or judge thereof entered pursuant to this section shall be deemed a final order; but by leave of court an independent suit may be brought not later than five days after such order is entered by any such person deeming himself aggrieved thereby, to restrain any action thereby authorized.

Section 710-100, General Code of Ohio.

Whenever any such bank of whose property and business the superintendent of banks has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after taking such possession apply to the Common Pleas Court of the county in which the office of such bank was located, to enjoin further proceedings in liquidation, and said court, after citing the superintendent of banks to show cause why further proceedings should not be enjoined and hearing the allega-

tions and proofs of the parties and determining the facts, may dismiss such application or enjoin the superintendent of banks from further proceedings, and direct him to surrender such business and property to such person, partnership, corporation, company, society or association.